the question whether particular damages are recoverable depends only on the answer to the question whether they are the direct consequences of the act".

Even if one could say that no one thought about the possibility or probability of an injury to the eye, it cannot be right if there are these frequent occasions when zinc trimmings fly off the machine due to improper adjustment of the guard that the defendants should do nothing constructive about it except re-adjusting the guard by the supervisor when he detects it. In my view there is a clear case of failure to take a precaution which if taken would result in the workman having less risk to undergo. I take the test which I think ought to be applied from the well known passage in the judgment of Lord Dunedin in *Morton* v. *William Dixon Ltd.*: (14)

"Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either — to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or — to show that it was a thing which was obviously wanted that it would be folly in anyone to neglect to provide it".

In my judgment the defendants are responsible for damages for breach of the duty which they owe to the plaintiff under the common law. With regard to contributory negligence and quantum of damages, I will adhere to my earlier finding under the first claim.

Order accordingly.

Solicitors: *B. Kaher Singh & Co.; Allen & Gledhill.*

THURARATNAM v. GULWANT SINGH

[F.C. (Barakbah L.P., Ong Hock Thye F.J. and Ismail Khan J.) July 12, 1966]

[K.L. — Federal Court Civil Appeal No. X 15 of 1965]

Moneylenders — Whether amount set out in promissory note was in fact lent — Moneylender's books of account — Moneylenders Ordinance, 1951, s.s 16 & 18.

This was an appeal against the decision of the High Court, which had given judgment in favour of the plaintiff in a moneylender's action claiming repayment with interest of moneys lent. The substantive defence was whether there was compliance with section 16 of the Moneylenders Ordinance and whether the amount in the promissory note was in fact lent. On appeal it was argued that the learned trial judge had not directed his mind to the defence that the purported loan was in fact the renewal of an earlier loan. It was also argued that the claim should have been dismissed as the books of account of the moneylender did not set out the details of the contract or that security in the form of a promissory note was provided.

Held: (1) as the learned trial judge had failed to determine the question whether the amount in the promissory note was in fact lent the appeal must be allowed and a retrial ordered;

(2) the Moneylenders Ordinance does not require all the details of the contract of loan to be set out in the books of account.

Cases referred to:—

(1) *Abirami Ammal* v. *Meyyappa Chettiar* [1959] M.L.J. 149, 151.

(2) *Ang Khye Pang* v. *Chop Ban Aik* [1939] M.L.J. 282.

(3) *Subramaniam* v. *Konar* [1962] M.L.J. 385, 387.

(4) *Nihalchand Narulchand* v. *Macmullan* [1934] 1 K.B. 171, 175.

(5) *Gulwant Singh* v. *Abdul Khalik* [1965] 2 M.L.J. 55.

FEDERAL COURT.

V. K. Palasuntharam (*D. S. Nath* with him) for the appellant.

Thomas Lee for the respondent.

Cur. Adv. Vult.

Ong Hock Thye F.J.: This is an appeal against a decision of the High Court at Kuala Lumpur given on October 7, 1965 in favour of the plaintiff in a moneylender's action claiming repayment, with interest, of moneys lent.

The statement of claim, in the usual form, alleged that on January 3, 1963 the plaintiff lent to the defendant the sum of $2,400 upon a promissory note payable on demand, at the interest rate of 18 per cent. per annum; that a copy of the promissory note was delivered to the defendant before the money was lent; that no repayments whatever had been made and that notice of demand had been duly served on the defendant before action. The amount claimed was $2,400 in respect of principal and $223.20 being interest thereon from January 3, 1963 to July 9, 1963, the date of issue of the writ.

In his defence, the defendant denied liability on three main grounds: first, that the said promissory note was not for moneys actually lent, but was executed under duress in respect of an antecedent liability of which the balance due was only $800; secondly, that three monthly payments of $50 each towards interest had been made, for which the defendant had not been given credit in this defendant's accounts, with the result that proof of failure to keep proper accounts rendered the claim unenforceable; thirdly, that the claim was unenforceable on other technical grounds for breach of divers provisions of the Moneylenders Ordinance, 1951. The amended defence, by additions and alterations was an amendment in entirety of the original, and runs to over four pages in twelve paragraphs.

The evidence on the record, of both parties, however, was quite brief and covered in all no more than four pages. The plaintiff stated that, since, 1955, he had lent the defendant moneys on three occasions only. The transactions were entered in his account books, which he produced. The first loan, of $1,200, was given on September 12, 1955 and repaid on July 6, 1960. The second,

of $800, was given on January 22, 1962 and allegedly repaid on November 22, 1962. The third, which was the subject-matter of the action, was given on January 3, 1963. Three months later, on March 12, 1963 the plaintiff demanded repayment in full, with interest. Under cross-examination he denied that the promissory note was given for any antecedent debt. This answer, of course, made it pointless and superfluous for defence counsel to put it to the plaintiff in so many words that the debt due was only $800 and that neither the alleged $2,400 nor any other sum was lent at all. The plaintiff had already denied in his evidence in chief that he had received $80 per month for January, February and March as interest.

The plaintiff called only one witness, Surat Singh, a watchman, who testified that he used to assist the former in keeping his accounts and that the receipts for $890 (Ex. P7) was written by him on November 22, 1962. On the relevant issues I should have thought that his evidence was of dubious value, if carefully analysed.

The defendant, a clerk in the Public Works Department, stated that he had known the plaintiff for more than ten years. The rest of his evidence is so brief that I shall quote him in full:

"I first saw him about a loan in 1955. I started with $200. I had more than five dealings with him. He used to ask me to write my own promissory note. I never borrowed $2,400. I owed him $800. I was unable to pay. On 3rd January 1963 I saw plaintiff near the Lido. He threatened me if I didn't pay him he would sue me. He asked me to go to his house. I went to his house. He asked me to give him a fresh promissory note for $2,400 on understanding that if I pay him promptly I pay $800 plus interest. I had to believe him. I received demand notice. I went to see him and told him I would pay outstanding interest. I paid interest from January, February, March at $80. I promised to pay off amount as soon as possible. I never received any money on 3rd January 1963. I did not receive a copy of the promissory note.

Cross-examination:

He always asked me to sign loan for double the amount I received. No evidence of five transactions. I did reply to plaintiff in writing".

The concluding addresses by counsel were very terse. Mr. Nath, counsel for the defendant, submitted that the promissory note did not set out the true nature of the transaction, while Mr. Peddie, in reply, only said that once the promissory note was regular, the document must be accepted. Judgment was then given on the spot as prayed.

The original memorandum of appeal was supplemented by further grounds delivered after receipt of the grounds of judgment dated February 3, 1966. Those grounds fall under two main heads. Under the first head is ground (5), namely:

"The learned trial judge failed to direct his mind to the probability of the defence being true generally, and with particular regard to the fact of the purported loan of $2,400 on 3rd January 1963 being probably a renewal of the loan which had been purportedly settled on November 22, 1962 but had probably not been settled on that date".

With all respect to the learned trial judge I think there is considerable substance in this contention. In his grounds of judgment he said,

"The substantive defence was on the question whether there was compliance with section 16 of the Ordinance and *whether the amount in the promissory note was in fact lent*".

After discussing the first issue, which he decided in favour of the plaintiff, he went on:

"Once the note is accepted as regular the next question would be *whether any amount* has been paid. The defendant alleged that he *paid interest* for the months of January, February and March amounting to $80. This was denied by the plaintiff. According to the evidence of the plaintiff he kept account books and receipt books and considering that receipts had been issued for previous payments in respect of previous debts it would seem strange that if any payments towards *interest* had been made the defendant never insisted on receipts. The defendant appears to be well-versed in the ways of moneylenders and on this occasion caution seemed to have deserted him. On the balance of probabilities I find as a fact that no amount was paid towards the *interest*. In the circumstances there will be judgment for the plaintiff for the sum of $2,623.20 interest and costs".

I think the two passages I have quoted from the judgment suffice to show that, although the question to be determined was rightly set out, it remained unanswered. The defendant had made two specific allegations in his defence, that he received nothing upon the execution of the promissory note and that he had paid $240 by way of interest. The second allegation only had been considered, while the first had been overlooked. Counsel for the plaintiff (respondent) contends that, notwithstanding there was no express reference to this question of fact, it was implicit in the judge's decision as to interest that he also decided the other point in the moneylender's favour, that the amount of the principal was in fact paid. I am afraid that this argument carried no weight with me: *expresso unius exclusio alterius*. The question undetermined was in fact the major issue of the two questions of fact and, approaching it with an open mind, several questions naturally arise, which clearly should have a bearing on whether the allegations of the defendant are not indeed more probable than improbable. However, in view of the order which I propose should be made on this appeal, I shall say no more on this point to the prejudice of any party.

Mr. Palasuntharam, counsel for the appellant, goes on to urge that, rather than ordering a retrial, the appeal ought to be allowed and the claim dismissed for non-compliance with the provisions of the Moneylenders Ordinance, namely, subsections (1), (3) and (4) of section 16 and

subsection (1) of section 18. To sum up, what counsel contends is that, under section 18(1), the moneylender's account of each loan shall clearly state in plain words the terms and transactions incidental to the account; that section 16(3) specifies that all the terms of the contract shall be distinctly shown: and that the plaintiff's account book (Ex. P3, fol. 57) failed to show that it was an agreed term of the contract, as borne out by the notice of demand, that interest was payable *monthly* and *without previous demand.* After careful consideration, I am satisfied that there are no merits whatever in this highly technical argument. It is to be remembered that subsection (3) of section 16 merely provides that the *rate* of interest shall be set out either in terms of so many per centum per annum or in the actual amount of such interest. To attempt to read into subsection (1) of section 18 and subsection (3) of section 16 further restrictions in a penal manner so as to render a claim unenforceable is a breach of accepted canons of construction which finds no favour with me. The essential fact is that the borrower was not even remotely likely to have been deceived, nor did he claim to have been under any misapprehension as to the rate or manner of payment of interest. For my own part, I do not think that if any moneylender keeps accounts, which for convenience, shows instantly the rate of accumulated interest at the end of any one month, he was thereby guilty of such a serious accounting misdemeanour that he loses all rights, by reason of subsection (2) of section 18, to enforce his claim at all.

Another further argument by counsel for the respondent is that a promissory note is a "security": see *Abirami Ammal* v. *Meyyappa Chettiar* [1]; *Ang Khye Pang* v. *Chop Ban Aik* [2]; *Subramaniam* v. *Konar* [3]; *Nihalchand Navalchand* v. *Macmullan* [4] and *Gulwant Singh* v. *Abdul Khalik* [5]; *ergo,* it was a term of the contract that a security should be provided and that such security should take the form of a promissory note, a fact not disclosed in the moneylender's account. In my opinion, the simple answer is that subsection (1) of section 18 is not to be read so that every term of the contract which is material under subsection (3) of section 16 must appear also in the books of account. The book of account is a horse of a different colour from a memorandum of the contract.

For the reasons stated above I would allow this appeal and order a retrial, all costs to abide the event.

Barakbah L.P. concurred.

Ismail Khan J.: I have had the benefit of reading the judgment of Ong F.J. with which I entirely agree and have nothing to add.

Appeal allowed.

Solicitors: *Eugene Lye & Co.; Skrine & Co.*

KOH HUNG KENG v. LOW PEE LORRY TRANSPORT CO. LTD.

[F.C. (Barakbah L.P., Ong Hock Thye F.J. and Ismail Khan J.) July 12, 1966]

[K.L. — Federal Court Civil Appeal No. X 22 of 1965]

Negligence — Road accident — Collision between two vehicles travelling in opposite directions — Whether there is presumption that both drivers were negligent.

Damages — Running-down action.

This was an appeal against the decision of the High Court which had dismissed a claim for damages in a running-down action. On appeal it was argued, *inter alia,* that the learned trial judge ought to have held that where, as in this case, there was a collision between two vehicles travelling in opposite directions, there was a *prima facie* presumption that both drivers were negligent.

Held: (1) on the evidence the learned trial judge was correct in rejecting the plaintiff's story;

(2) there is no absolute rule of law that where the court is unable to say which of the two parties was to blame, they must be held both to blame.

Cases referred to:—

(1) *Ong Yam Chong* v. *Chan Wah* [1962] M.L.J. 184.

(2) *Baker* v. *Market Harborough Industrial Co-operative Society Ltd.* [1953] 1 W.L.R. 1472, 1476.

(3) *France* v. *Parkinson* [1954] 1 All E.R. 759.

FEDERAL COURT.

Chew Kok Chooi for the appellant.

M. S. Naidu for the respondent.

Cur Adv. Vult.

Ong Hock Thye F.J.: This is an appeal by the plaintiff against the decision of the High Court at Malacca dismissing his claim for damages in a running-down action.

The accident occurred on October 21, 1962 at about 3.30 p.m. during fine weather, at or near a curve of the road between Malacca and Alor Gajah, while the plaintiff was alleged to be driving his motor car No. S. 5221 towards Alor Gajah. The defendants' lorry was travelling in the opposite direction, towards Malacca, with a four-ton load of fresh fish. By their statement of claim and defence the parties charged each other with negligently encroaching on the wrong side of the road at the bend and thereby causing the collision.

In the event the learned trial judge disbelieved the evidence of the plaintiff and his witnesses. Consequently, on their failure to discharge the onus of proof, the claim was dismissed with costs.

The appeal rests substantially on two